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The Rise of Systematic Pre-Exclusion Delay: Proposing a Solution to Decades on Death Row

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THE RISE OF SYSTEMATIC PRE-EXECUTION DELAY: PROPOSING A SOLUTION TO DECADES ON DEATH ROW

*Krista MacKay**

Abstract

Although the claim that death row inmates' pre-execution delays violate the Eighth Amendment has been historically unsuccessful, the decision in *Jones v. Chappell* paved a new path to its success. In *Jones*, despite the Ninth Circuit's disagreement, a federal judge in California became the first to rule that systematic delay has rendered California's death penalty system unconstitutional. The court in *Jones* defined systematic delay as delay inherent to the state's dysfunctional administration of the death penalty. Due to increasing pre-execution delays nationwide and recent initiatives to examine and repeal state death penalty systems, other state courts may soon come to recognize and declare systematic delay unconstitutional using reasoning similar to the court in *Jones*. This would likely require the Supreme Court to finally address the constitutionality of pre-execution delay. In the meantime, pre-execution delay is problematic for inmates on death row—even if not yet declared unconstitutional—and a solution is necessary to uphold the purposes of the death penalty. One state attempting to address this problem is Florida. Florida recently passed the "Timely Justice Act," the first legislation of its kind, in an effort to reduce postconviction delays for death row inmates. Although Florida's Act has been the subject of heated controversy, California has since passed a similar proposition titled the "Death Penalty Reform and Savings Act of 2016." This Note examines the limited existing legislation seeking to speed up the postconviction review process and ultimately proposes more effective recommendations for legislation to resolve systematic delay.

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INTRODUCTION

Of the 8124 people who received a death sentence between 1977 and 2013, states have only executed seventeen percent.¹ The thousands of prisoners currently on death row spend an average 15.5 years between sentencing and execution, a number that has steadily increased since the death penalty was reinstated in 1976.² In response, death row inmates have argued that such lengthy execution delays violate the Eighth

1. TRACY L. SNELL, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 2013—STATISTICAL TABLES 2 (2013), <http://www.bjs.gov/content/pub/pdf/cp13st.pdf>.

2. *See id.* at 14.

Amendment's protection from cruel and unusual punishment.³ Coined "*Lackey* claims,"⁴ such assertions have been historically unsuccessful at both the state and federal levels.⁵ In continually denying certiorari to *Lackey* claims, the U.S. Supreme Court has indicated that a successful claim will require some degree of state-caused—systematic—delay.⁶

In July 2014, the U.S. District Court for the Central District of California became the first court ever to recognize and declare the systematic delay of the state's death penalty unconstitutional under the Eighth Amendment's prohibition against cruel and unusual punishment.⁷ *Jones v. Chappell*⁸ defined systematic delay as excessive and unpredictable pre-execution delay inherent to the "dysfunctional administration of California's death penalty system."⁹ The court in *Jones* held that such systematic delay results in arbitrary execution; as for the few inmates who actually realize the possibility of death, their selection for execution will predominately depend upon the amount of time it takes them to proceed through California's "dysfunctional post-conviction review process."¹⁰ The court further ruled that such inherent delays deprive the death penalty of its deterrent and retributive purposes.¹¹

As its core authority for showing the state's systematic delay, the court in *Jones* relied upon a comprehensive study of the state's death penalty system performed by the California Commission on the Fair Administration of Justice (Commission).¹² The Commission Report found that delay penetrates every stage of California's capital

3. *E.g.*, *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., respecting denial of certiorari).

4. *See* Brent E. Newton, *Justice Kennedy, the Purposes of Capital Punishment, and the Future of Lackey Claims*, 62 BUFF. L. REV. 979, 999 (2014).

5. *See, e.g.*, *People v. Anderson*, 22 P.3d 347, 390 (2001) ("[A]ppellate delay in a capital case is not cruel and unusual punishment.").

6. *See, e.g.*, *Knight*, 528 U.S. at 993 (Breyer, J., dissenting) ("Where a delay . . . reflects the State's own failure to comply with the Constitution's demands, the claim that the time has rendered the execution inhuman is a particularly strong one."); *Lackey*, 514 U.S. at 1047 (stating that it "may be appropriate to distinguish . . . among delays resulting from (a) a petitioner's abuse of the judicial system . . . ; (b) a petitioner's legitimate exercise of his right to review; and (c) negligence or deliberate action by the State").

7. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1053 (C.D. Cal. 2014), *rev'd sub nom.*, *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015). The merits of the case remain influential although the U.S. Court of Appeals for the Ninth Circuit stated that it was barred from reviewing the claim because federal courts may not consider novel constitutional theories on habeas review. *Davis*, 806 F.3d at 541.

8. 31 F. Supp. 3d 1050.

9. *Id.* at 1053.

10. *Id.* at 1062.

11. *Id.* at 1063.

12. *Id.* at 1055–56.

postconviction review process.¹³ In 2008, the state's elapsed time from sentencing to execution exceeded two decades,¹⁴ a delay much greater than the national average at that time and today.¹⁵ But California's delay between sentencing and execution does not make it an extreme outlier when compared with the Bureau of Justice Statistics' (Bureau) Report.¹⁶ According to the Bureau Report, as of year-end 2013, many states' pre-execution delays exceeded that of California.¹⁷

Other states' death penalty systems have also undergone extensive review like California, and a handful of states have recently implemented moratoriums on executions.¹⁸ The national rise in pre-execution delay, the increasing interest in reviewing state death penalty systems, and the recent trend of death penalty suspensions collectively suggest that other states may be well on their way to following the court in *Jones* in recognizing systematic delays of the death penalty.¹⁹ Systematic delay could moreover be the means for the Supreme Court to finally address a *Lackey* claim.²⁰ Regardless, because pre-execution delay of the death penalty is not subsiding, it remains clear that a solution must be identified to ensure the death penalty's constitutionality.

Florida passed the "Timely Justice Act" in July of 2013, seeking to speed up the procedural timeline for death row inmates.²¹ Once an inmate's appeals become final, the Act requires the governor to sign a warrant for execution within thirty days, which is to be carried out no more than 180 days later.²² The Act additionally addresses areas

13. *Id.*

14. CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA 6 (2008) [hereinafter COMMISSION REPORT].

15. In 2008, the national average delay between sentencing and execution was 11.6 years, and in 2013 it was 15.5 years. *See* SNELL, *supra* note 1, at 14 tbl.10.

16. *See id.* at 18 tbl.15 (listing states with similar average delay times).

17. *Id.* (showing Texas, Nevada, Georgia, Tennessee, Ohio, Maryland, and North Carolina as having longer pre-execution delays than California).

18. *See, e.g., Illinois Commission on Capital Punishment*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/674> (last visited Jan. 17, 2017). In 2003, the American Bar Association began performing its own assessments on several state capital punishment systems, primarily to determine the extent to which they achieve fairness and due process. AM. BAR ASS'N, EXECUTIVE SUMMARY OF THE FLORIDA DEATH PENALTY REPORT i, <http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/florida/executivesummary.authcheckdam.pdf> (last visited Jan. 17, 2017).

19. *See* Newton, *supra* note 4, at 999 ("*Jones* is likely to serve as a catalyst for a renewed round of *Lackey* claims, in particular 'systemic *Lackey* claims.'").

20. *Id.*

21. *See* S.B. 1750, 2013 Leg., Reg. Sess. (Fla.) (legislative history of Timely Justice Act of 2013, 2013 Fla. Laws 2596).

22. FLA. STAT. § 922.052(2)(b) (2015).

including legal representation and reporting requirements.²³ As the first legislation of its kind,²⁴ the Timely Justice Act has been the subject of great controversy.²⁵ However, since the Act's passing, California voters passed similar legislation in the November 2016 election.²⁶ This Note analyzes the ability of legislation that speeds up the postconviction review process to alleviate the systematic delay recently identified in California's death penalty system—delay that other states and even the Supreme Court may soon recognize as highly problematic.

Part I of this Note provides a historical perspective, beginning with a brief evolution of the death penalty's standards and then analyzing the Supreme Court's treatment of *Lackey* claims. Part II examines the recent decision in *Jones* and explains why other states may also be experiencing systematic delay. Part III analyzes limited existing state legislation aiming to speed up postconviction review. Finally, Part IV proposes a solution to systematic delay, suggesting provisions for effective state legislation.

I. THE EMERGENCE OF *LACKEY* CLAIMS

The Eighth Amendment's cruel and unusual clause has long been interpreted to prohibit arbitrary application of the death penalty. This Part provides a brief evolution of the death penalty's non-arbitrary requirement and then analyzes the Supreme Court's treatment of *Lackey* claims. Although the court in *Jones* held that systematic delay violates the non-arbitrary requirement,²⁷ the Supreme Court has yet to accept certiorari for a *Lackey* claim.

A. *The Rise of the Non-arbitrary Requirement*

The Eighth Amendment prohibits the imposition of cruel and unusual punishment.²⁸ Although the Constitution does not explicitly define cruel

23. S.B. 1750.

24. Susanna Bagdasarova, *Florida Accelerates Death Penalty Process with "Timely Justice Act,"* PROJECT PRESS (Am. Bar Ass'n Death Penalty Representation Project, Washington, D.C.), Summer 2013, http://www.americanbar.org/publications/project_press/2013/summer/florida-accelerates-death-penalty-process-with-timely-justice-ac.html.

25. See, e.g., David A. Love, *Florida's Timely Justice Act Is Neither Timely Nor Justice*, HUFFINGTON POST (July 17, 2013, 5:12 AM), http://www.huffingtonpost.com/david-a-love/floridas-timely-justice-act-death-penalty_b_3283060.html.

26. Death Penalty Reform and Savings Act of 2016, Cal. Prop. 66, https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0096%20%28Death%20Penalty%29_0.pdf.

27. See *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1068 (C.D. Cal. 2014), *rev'd sub nom.*, *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

28. U.S. CONST. amend. VIII.

and unusual,²⁹ the Court has long held that this proscription must be construed according to society's "evolving standards of decency."³⁰ In 1972, petitioners in *Furman v. Georgia*³¹ argued that such societal standards had progressed to the point that the death penalty was no longer constitutional.³² The Court found that the death penalty was being selectively applied due to a lack of criteria for its imposition, which violated the Eighth Amendment's prohibition of cruel and unusual punishment.³³

Although there was no majority opinion in *Furman*, the Court invalidated the petitioners' death sentences, holding that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."³⁴ In *Furman*, Justice William O. Douglas compared the death penalty's selective application to the unusualness of getting struck by lightning.³⁵ As Justice Potter Stewart explained, to "permit this unique penalty to be so wantonly and so freakishly imposed" would clearly violate the Eighth Amendment.³⁶ This need for reliability in the determination of death stemmed from the fact that "death is different," unique from all other forms of punishment in its finality.³⁷ The Court additionally recognized that allowing the death penalty to be arbitrarily imposed would no longer serve the fundamental penological goals of deterrence and retribution.³⁸ The decision in *Furman* effectively suspended the death penalty, prompting states to enact new statutes that

29. Matthew C. Brewer, Comment, *Constitutional Law: Broadening the Criteria for Defining Cruel and Unusual Punishment*, 55 FLA. L. REV. 731, 732 (2003).

30. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."). These standards come from "history and traditional usage, legislative enactments, and jury determinations." *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) (footnotes omitted).

31. 408 U.S. 238 (1972).

32. See *id.* at 239.

33. *Arbitrariness*, DEATH PENALTY INFO. CTR. (July 16, 2015), <http://deathpenaltyinfo.org/arbitrariness>. Specifically, the Court was concerned that the death penalty was being unevenly applied based on prejudices against minorities. See *Furman*, 408 U.S. at 255 (Douglas, J., concurring); *id.* at 364 (Marshall, J., concurring).

34. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

35. *Furman*, 408 U.S. at 309 (Douglas, J., concurring).

36. *Id.* at 310 (Stewart, J., concurring).

37. *Gregg v. Georgia*, 428 U.S. 153, 188 (1973); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); see *Furman*, 408 U.S. at 287 (Brennan, J., concurring).

38. See *Furman*, 408 U.S. at 311–12 (White, J., concurring) (explaining "a major goal of the criminal law—to deter others by punishing the convicted criminal—would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others," and "when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied").

would safeguard against arbitrary sentencing.³⁹ Four years later, in 1976, the Court in *Gregg v. Georgia*⁴⁰ upheld the revised sentencing statutes of Florida, Georgia, and Texas as non-arbitrary in their application and therefore constitutional—effectively reinstating the death penalty.⁴¹ Although scholars, including current Justices of the Supreme Court, continue to debate whether the death penalty constitutes cruel and unusual punishment, the government unquestionably remains responsible for ensuring that courts do not arbitrarily impose the death penalty and that it furthers the aims of retribution and deterrence.⁴²

B. *A Brief History of the Supreme Court's Treatment of Lackey Claims*

The claim that pre-execution delay violates the Eighth Amendment's cruel and unusual standard was first raised to the U.S. Supreme Court in the 1995 case of *Lackey v. Texas*.⁴³ The defense attorney who represented petitioner Clarence Lackey has explained the claim's arguments: first, a prolonged stay on death row was cruel and unusual because it inflicted a greater punishment than the death penalty; and second, such a lengthy delay no longer served the purposes of retribution and deterrence—particularly when the state primarily caused the delay.⁴⁴ Although the Court ultimately denied certiorari to Lackey, Justices Stephen G. Breyer and John P. Stevens agreed that Lackey's claim was nonetheless important.⁴⁵ Respecting denial of certiorari, Justice Stevens explained that over a century earlier, the Court recognized the uncertainty experienced by a confined prisoner awaiting execution as “one of the most horrible feelings,”⁴⁶ and because that had been in reference to a four-week pre-execution delay, “that description should apply with even

39. DEATH PENALTY INFO. CTR., *supra* note 33.

40. 428 U.S. 153 (1976).

41. DEATH PENALTY INFO. CTR., *supra* note 33. The revised sentencing statutes provided objective criteria to limit discretion in the death penalty's imposition and permitted the court to consider an individual defendant's character and record.

42. See *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1063–64 (C.D. Cal. 2014), *rev'd sub nom.*, *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015); see also Blake J. Delaney, Comment, *A Cruel and Unusual Application of the Proportionality Principle in Eighth Amendment Analysis*, 56 FLA. L. REV. 459, 460 (2004) (noting that the debate of whether a punishment violates the cruel and unusual clause of the Eighth Amendment has been ongoing for almost 100 years).

43. 514 U.S. 1045 (1995). In the years following, this argument became known as a “*Lackey* claim.” See Newton, *supra* note 4, at 980.

44. Newton, *supra* note 4, at 981–84. While the petitioner's brief for certiorari did not address retribution or deterrence, the Supreme Court's denial of certiorari included a brief discussion of these points. *Lackey*, 514 U.S. at 1045 (Stevens, J., respecting denial of certiorari).

45. *Lackey*, 514 U.S. at 1047.

46. *Id.* at 1045 (quoting *In re Medley*, 134 U.S. 160, 172 (1890)).

greater force in the case of delays that last for many years.”⁴⁷ Justice Stevens further opined that because such a claim had the “potential for far-reaching consequences,” lower courts should “serve as laboratories” to further study its merits before the Supreme Court addresses it.⁴⁸

Since *Lackey*, other death row inmates have also asserted that delays in the postconviction review process rendered their sentences unconstitutional. In *Elledge v. Florida*,⁴⁹ the Supreme Court declined to address the constitutionality of a Florida inmate’s twenty-three year stay on death row.⁵⁰ Respecting denial of certiorari, Justice Breyer argued that such an extended execution delay was unusual, whether compared to the death penalty’s practice at that time or to the practices of America and England when the Constitution was written.⁵¹ He additionally referred to the claim as “serious” because the state’s faulty post-conviction process was responsible for the delay.⁵²

In *Knight v. Florida*,⁵³ Justice Breyer again dissented from the denial of certiorari of another *Lackey* claim, pressing that the Court should look to international courts for guidance, as many other countries have held lengthy pre-execution delays “inhuman, degrading, or unusually cruel.”⁵⁴ In opposition, Justice Clarence Thomas, concurring with the majority in denial of certiorari, stated, “It is incongruous to arm capital defendants with an arsenal of ‘constitutional’ claims with which they may delay their executions, and simultaneously [allow them] to complain when [their] executions are inevitably delayed.”⁵⁵ He additionally argued that the lower courts’ time of experimentation originally suggested by Justice Stevens in *Lackey* should be considered concluded, as courts have repeatedly rejected the claim as meritless.⁵⁶ Distinguishing this contention, however, Justice Breyer emphasized that most of the *Lackey* claims rejected at the lower court level “involved procedural failings that in part or in whole determined the outcome of the case,” and only four of the eight *Lackey* claims heard on the merits involved delays for which the state was arguably responsible.⁵⁷ Thus, he argued it was “hardly evident” that the

47. *Id.* at 1046.

48. *Id.* (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983)).

49. 525 U.S. 944 (1998).

50. *Id.* at 944 (Breyer, J., dissenting).

51. *Id.*

52. *Id.*

53. 528 U.S. 990 (1999).

54. *Id.* at 995 (Breyer, J., dissenting).

55. *Id.* at 992 (Thomas, J., concurring).

56. *Id.* at 992–93.

57. *Id.* at 998 (Breyer, J., dissenting).

experiment should be considered concluded.⁵⁸ By pointing out the limited number of *Lackey* claims involving delay caused by the state, Justice Breyer suggested that a successful *Lackey* claim will require some degree of systematic delay.

As *Lackey* claims continued to appear, the gap between death sentences and executions continued to increase.⁵⁹ In the 2009 case of *Thompson v. McNeil*,⁶⁰ Justice Stevens argued that even the then-average delay of nearly thirteen years underscored “the fundamental inhumanity and unworkability of the death penalty as it is administered in the United States,” and surely the Florida petitioner’s stay on death row for thirty-two years would be “unacceptably cruel.”⁶¹ But again, Justice Thomas, concurring with the denial of certiorari, argued, “It makes ‘a mockery of our system of justice . . . for a convicted murderer, who, through his own interminable efforts of delay . . . has secured the almost-indefinite postponement of his sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional.’”⁶² Justice Breyer, however, stressed that a significant amount of the delay in William Thompson’s case occurred as a result of the state’s defective death penalty procedures, which were out of the petitioner’s control.⁶³ Thus, the Court’s debate again centered on whether the pre-execution delay was caused by the state or self-inflicted. While the Justices have yet to agree on this issue in any of the *Lackey* claim cases to reach them, Justice Thomas’s arguments indicate he would likely agree that some degree of state-caused delay is necessary for a successful claim.

58. *Id.* at 999.

59. *See, e.g., Valle v. Florida*, 132 S. Ct. 1, 1 (2011) (Breyer, J., dissenting from denial of stay) (referring to an over-thirty-three-year stay on death row, Justice Breyer stated, “I have little doubt about the cruelty of so long a period of incarceration under sentence of death”); *Smith v. Arizona*, 552 U.S. 985, 986 (2007) (Breyer, J., dissenting) (“I am unaware of other executions that have taken place after so long a delay [as over thirty years], particularly when much of the delay at issue seems due to constitutionally defective sentencing proceedings.”); *Foster v. Florida*, 537 U.S. 990, 992 (2002) (Breyer, J., dissenting) (arguing that a twenty-seven-year confinement while awaiting execution would be unusual not only in America—where at the time the average delay was eleven to twelve years—but also in other nations, which held that delays of less than fifteen years were “degrading, shocking, or cruel”).

60. 556 U.S. 1114 (2009).

61. *Id.* at 1116 (Stevens, J., respecting denial of certiorari).

62. *Id.* at 1117 (Thomas, J., concurring) (quoting *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring)).

63. *Id.* at 1120 (Breyer, J., dissenting).

Unlike previous denials of certiorari to *Lackey* claims,⁶⁴ the 2009 case of *Johnson v. Bredeson*⁶⁵ addressed whether pre-execution delay furthers the penological purposes of retribution and deterrence. Justice Stevens issued an opinion respecting denial of certiorari, joined by Justice Breyer, stating that lengthy pre-execution delay weakens the death penalty's justifications.⁶⁶ In response, Justice Thomas argued that "[s]uch views, no matter how 'steadfast[ly]' held are not grounds for enjoining petitioner's execution or for granting certiorari."⁶⁷ He explained that delay is inevitable in providing inmates procedural safeguards, and although there are alternatives to delay, a system in which execution immediately follows sentencing would likely be unconstitutional.⁶⁸

More recently, Justice Anthony Kennedy indirectly weighed in on pre-execution delay. In the 2014 case of *Hall v. Florida*,⁶⁹ the Supreme Court granted certiorari to determine whether a mentally disabled capital defendant was eligible for the death penalty.⁷⁰ Although the case did not present a *Lackey* claim, for those familiar with Justice Breyer's stance on pre-execution delay, it came as no surprise that during the oral argument he pointed out that Freddie Hall had spent thirty-five years on death row.⁷¹ However, Justice Kennedy's comments that followed were not only off-topic, but unexpected.

JUSTICE KENNEDY: [T]he last ten people Florida has executed have spent an average of 24.9 years on death row. Do you think that that is consistent with the purposes of the death penalty, and . . . is it consistent with sound administration of the justice system?

MR. WINSOR [counsel for the State of Florida]: Well, I certainly think it's consistent with the Constitution, and I think that there are obvious

JUSTICE KENNEDY: That wasn't my question.

MR. WINSOR: Oh, I'm sorry, I apologize.

64. See, e.g., *id.* at 1116 (Stevens, J., respecting denial of certiorari) (noting that "delaying an execution does not further public purposes of retribution and deterrence but only diminishes whatever possible benefit society might receive from the petitioner's death"); *Knight v. Florida*, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting) ("[T]he longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes.").

65. 558 U.S. 1067 (2009).

66. *Id.* at 1069 (Stevens, J., respecting denial of certiorari).

67. *Id.* at 1072 (Thomas, J., concurring) (citation omitted).

68. *Id.* at 1072–73.

69. 134 S. Ct. 1986 (2014).

70. See *id.* at 1991–92.

71. Transcript of Oral Argument at 45, *Hall*, 134 S. Ct. 1986 (No 12-10882).

JUSTICE KENNEDY: Is it consistent with . . . the purposes that the death penalty is designed to serve, and is it consistent with an orderly administration of justice?

. . . .

MR. WINSOR: It is consistent with the purposes of the death penalty certainly.

JUSTICE SCALIA: General Winsor, maybe you should ask us . . . that question, inasmuch . . . as most of the delay has been because of rules that we have imposed.

JUSTICE KENNEDY: Well, . . . let me . . . ask this. Of course most of the delay is at the hands of the defendant. In this case it was 5 years before there was a hearing . . . on the Atkins question. Has the attorney general of Florida suggested to the legislature . . . any measures, any provisions, any statutes, to expedite the consideration of these cases.

MR. WINSOR: Your Honor, there was a statute enacted last session, . . . called the Timely Justice Act, that addresses a number of issues that you raise, and it's presently being challenged in front of the Florida Supreme Court.⁷²

Justice Kennedy's comments are significant because they may indicate his newfound agreement with the viewpoint of Justice Breyer and Justice Stevens that the Supreme Court should grant certiorari to finally address *Lackey* claims. The fact that Justice Kennedy commented on the average time spent on death row may additionally suggest his interest in systematic execution delay⁷³ similar to that recently recognized as unconstitutional in California.⁷⁴ Moreover, his concern regarding the furtherance of penological purposes is notable, as it too lines up with the reasoning of the decision in *Jones*.⁷⁵

II. THE RECOGNITION OF SYSTEMATIC DELAY

This Part examines the recent case of *Jones*, which declared that the systematic delay of California's death penalty system has rendered it unconstitutional.⁷⁶ The court in *Jones* defined systematic delay as delay inherent to the state's dysfunctional administration of the death penalty—

72. *Id.* at 46–47.

73. *See* Newton, *supra* note 4, at 998.

74. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1069 (C.D. Cal. 2014), *rev'd sub nom.*, *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

75. *See id.* at 1063–65.

76. *Id.* at 1069.

affecting every stage of an inmate's postconviction review process.⁷⁷ This Part first provides an overview of California's systematic delay, focusing on the Commission's study which greatly influenced the decision in *Jones*. Then, after examining *Jones*, this Part explains that other states' death penalty systems are also likely experiencing systematic delay.

A. Examining *Jones v. Chappell*

In 1992, a twenty-eight-year-old Ernest Jones was arrested and charged with murder in California.⁷⁸ He was then sentenced to death three years later in 1995.⁷⁹ As of June 2014, Jones had spent twenty-two years in prison—nineteen of which he spent on death row awaiting final review of his conviction and sentence.⁸⁰ Unfortunately, this elapsed time between sentencing and execution is representative of the death penalty system in California.⁸¹

1. An Overview of California's Systematic Delay

The court in *Jones* relied greatly upon the Commission's comprehensive study of the California's death penalty system.⁸² California established the Commission in 2004, in response to unbiased study and review in other states which had resulted in considerable improvements to the criminal justice system.⁸³ The Commission was the first official body to undertake review of California's death penalty since the system was reinstated in 1977.⁸⁴ The final Commission Report, released in 2008, found that the state's death penalty system is dysfunctional—plagued by backlog and delay at every stage of an inmate's postconviction review process.⁸⁵

A defendant sentenced to death in California, like nearly all other death penalty states,⁸⁶ is entitled to three stages of postconviction

77. *See id.* at 1053.

78. First Amended Petition for Writ of Habeas Corpus by a Prisoner in State Custody at 415, *Jones*, 31 F. Supp. 3d 1050 (No. CV-09-2158-CJC) [hereinafter Petitioner's Brief].

79. *Jones*, 31 F. Supp. 3d at 1052–53.

80. *See id.* Jones was additionally expected to spend several more years in the process of reviewing his case. *See id.* at 1053.

81. *See id.* (“Indeed, for most, systemic delay has made their execution so unlikely that the death sentence carefully and deliberately imposed by the jury has been quietly transformed into one no rational jury or legislature could ever impose: *life in prison, with the remote possibility of death.*”).

82. *See id.* at 1055.

83. *Charge*, CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, <http://web.archive.org/web/20160707234556/http://ccfaj.org/?reqp=1&reqr=nzedYaOjp253YzWyqN==>.

84. COMMISSION REPORT, *supra* note 14, at 1.

85. *Id.* at 3.

86. Gerald F. Uelman, *Death Penalty Appeals and Habeas Proceedings: The California*

review.⁸⁷ These stages consist of an automatic direct appeal to the California Supreme Court, a state habeas petition to the California Supreme Court, and a federal habeas petition to a federal district court.⁸⁸ A defendant may then appeal decisions by the California Supreme Court on the direct appeal and state habeas claim to the U.S. Supreme Court by petition for writ of certiorari.⁸⁹ Further, a decision by the federal district court on the federal habeas claim may be appealed to the U.S. Court of Appeals for the Ninth Circuit and then to the U.S. Supreme Court.⁹⁰

Delay for death row inmates in California first sets in while awaiting appointment of counsel to handle direct appeals to the California Supreme Court.⁹¹ According to the Commission Report, appointment of counsel for the direct appeal takes an average of three to five years.⁹² Cases are then scheduled for a hearing before the California Supreme Court.⁹³ However, the briefing process can take up to four years, followed by a wait of two to three years until oral arguments are scheduled.⁹⁴ Most inmates thus spend a total of twelve to fourteen years litigating their direct appeals before the California Supreme Court.⁹⁵ The court in *Jones* attributed much of this delay to the state's underfunding of its death penalty system, resulting in a "severe shortage of qualified attorneys available to accept appointment as counsel on direct appeal."⁹⁶

Experience, 93 MARQ. L. REV. 495, 498, 501, 502 (2009); *Death Penalty Appeals Process*, CAPITAL PUNISHMENT IN CONTEXT, <http://www.capitalpunishmentincontext.org/resources/dpappealsprocess> (last visited Jan. 17, 2017).

87. *Id.* at 21.

88. *Id.*

89. *Id.*

90. *Id.* at 21–22. This postconviction review process is almost identical in all capital states. See *Post Conviction in Capital Cases*, CAP. PUNISHMENT IN CONTEXT, <http://www.capitalpunishmentincontext.org/issues/postconviction> (last visited Jan. 17, 2017) (discussing the appellate and habeas review process in capital states).

91. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1056 (C.D. Cal. 2014), *rev'd sub nom.*, *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015). Indigent death row prisoners have a constitutional right to court-appointed counsel for their initial appeal to the state court. JAMES R. ACKER, *QUESTIONING CAPITAL PUNISHMENT* 236 (2014). Although this constitutional right does not exist at the later stages of review, most states provide statutory rights to court appointed counsel in postconviction proceedings. *Id.*; see e.g., CAL. PENAL CODE § 1240 (2016).

92. COMMISSION REPORT, *supra* note 14, at 23. Delay in appointment of counsel postpones certification of the record's accuracy, which must be completed within 120 days of appointment as required by California Penal Code Section 190.8(g). *Id.* at 23 n.28.

93. COMMISSION REPORT, *supra* note 14, at 23.

94. See *id.* at 44.

95. *Id.* at 45.

96. *Jones*, 31 F. Supp. 3d at 1056. For instance, "the Office of the State Public Defender's budget has been cut and its staff reduced," and private appointed counsel are paid at a low rate. *Id.*

Although prompt appointment of habeas counsel would enable the state habeas petition to be drafted during the direct appeal proceedings and then swiftly filed upon the direct appeal's conclusion, the Commission regrettably found that the average delay in appointing state habeas counsel is eight to ten years in California.⁹⁷ This number of prisoners without state habeas counsel has continually risen in the state.⁹⁸ As of June 2014, there were 352 prisoners awaiting appointment of state habeas counsel.⁹⁹ Delays in appointment of state habeas counsel "can again be traced to underfunding issues similar to those on direct appeal."¹⁰⁰ Once counsel is appointed and files the habeas petition, the Commission reported that there is an additional delay of 1.8 years until the California Supreme Court issues a decision.¹⁰¹ This delay, however, has more than doubled since the Commission Report; in 2014, it took around four years from the filing of the petition until a decision was issued.¹⁰² Overall, an inmate will have spent seventeen years or more by the time he completes his direct appeal and state habeas review before the California Supreme Court.¹⁰³

When the court denies a state habeas petition, an inmate may then file a habeas petition in federal court.¹⁰⁴ The Commission found that the delay from a habeas petition's filing to a grant or denial by the federal court averaged 6.2 years.¹⁰⁵ Including a potential appeal to the U.S. Court of Appeals for the Ninth Circuit and an appeal therefrom to the U.S. Supreme Court, the federal habeas review stage in California takes an average of 10.4 years.¹⁰⁶ The court in *Jones* found that state habeas proceedings significantly affect federal habeas proceedings.¹⁰⁷ For instance,

if an inmate discovers new facts in the federal proceeding that were not before the California Supreme Court when it decided the state habeas petition, that inmate must generally halt the federal proceeding and return to the California

97. COMMISSION REPORT, *supra* note 14, at 24.

98. *Jones*, 31 F. Supp. 3d at 1058 ("[A]s of June 2014, 352 inmates—nearly half of Death Row—were without habeas corpus counsel. And that number is up from 291 inmates awaiting appointment of habeas counsel in 2008." (citation omitted)).

99. *Id.* Comparatively, seventy-one death row prisoners were awaiting counsel for direct appeal. *Id.* at 1056.

100. *Id.* at 1058.

101. See COMMISSION REPORT, *supra* note 14, at 24.

102. *Jones*, 31 F. Supp. 3d at 1059.

103. *Id.*

104. *Id.*; 28 U.S.C. § 2254(a) (2012).

105. COMMISSION REPORT, *supra* note 14, at 57.

106. See *id.* at 58.

107. *Jones*, 31 F. Supp. 3d at 1059.

Supreme Court by way of an exhaustion petition to present to it the new facts and exhaust the state remedy.”¹⁰⁸

The Commission found that “74% of federal habeas applications filed by California death row inmates are stayed for the exhaustion of state remedies.”¹⁰⁹ Delay for failure to exhaust is also a problem that stems from the underfunding of state habeas counsel; this underfunding forces federal habeas counsel “to conduct an investigation at federal government expense to determine all the facts necessary to support unexhausted federal constitutional claims and to discover facts necessary to prove exhausted claims.”¹¹⁰

The Commission found that for those who are denied relief at every level of postconviction review, the total time spent between the judgment of death and execution is twenty to twenty-five years.¹¹¹ Also notable, California has not carried out an execution since 2006.¹¹² Such prolonged delay attributable to the state’s dysfunctional administration of the death penalty system is what the court ultimately considered systematic delay.

After the court sentenced Jones to death in 1995, he waited roughly four years until he received counsel for his direct appeal.¹¹³ He then waited another four years for the California Supreme Court to affirm his sentence in March of 2003.¹¹⁴ Altogether, about eight years passed for Jones from the imposition of his death sentence until the completion of his automatic appeal.¹¹⁵ Jones received state habeas counsel in October of 2000, five years after his sentence was imposed and while he was still litigating his direct appeal.¹¹⁶ The court waited 6.5 years after Jones’s filing to ultimately deny his state habeas petition.¹¹⁷ Jones filed the relevant petition for federal habeas review in March of 2010, and he

108. 28 U.S.C. § 2254(b)(1)(A) (2012) (requiring petitioner for a writ of habeas corpus to exhaust all remedies available in state court); see *Jones*, 31 F. Supp. 3d at 1059 (explaining that if an inmate discovers new facts that were not in front of the state court when the state court ruled on the habeas petition, then the inmate must halt federal proceedings and return to state court).

109. COMMISSION REPORT, *supra* note 14, at 58.

110. Judge Arthur L. Alarcón, *Remedies for California’s Death Row Deadlock*, 80 S. CAL. L. REV. 697, 748 (2007).

111. COMMISSION REPORT, *supra* note 14, at 25. Although the opinion in *Jones* says “the process will likely take 25 years or more,” *Jones*, 31 F. Supp. 3d at 1054, this is misleading as the court’s ultimate authority came from the Commission Report. Comparatively, the national average lapse between sentencing and execution in 2008 was 11.6 years. See SNELL, *supra* note 1, at 14 tbl.10.

112. *Jones*, 31 F. Supp. 3d at 1060.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Jones*, 31 F. Supp. 3d at 1060.

amended his claim in April of 2014, asserting that California's systematically delayed postconviction review process results in arbitrary executions and serves no penological purpose.¹¹⁸

2. The Court's Reasoning

The court explained that as a result of such systematic delay, California's death penalty only becomes a reality for a small number of prisoners.¹¹⁹ As for the few that do realize this reality,

their selection for execution will not depend on whether their crime was one of passion or of premeditation, on whether they killed one person or ten, or on any other proxy for the relative penological value that will be achieved by executing that inmate over any other Rather, it will depend upon a factor largely outside an inmate's control, and wholly divorced from the penological purposes the State sought to achieve by sentencing him to death in the first instance: how quickly the inmate proceeds through the State's dysfunctional post-conviction review process.¹²⁰

Just as it would be arbitrary to randomly select which members of the population to sentence to death, the court found that it is arbitrary to randomly select within a group of death row inmates which ones to carry out executions against.¹²¹

The court additionally held that for the random few that do face execution, they will have remained on death row for so long that their execution will no longer serve the purposes of retribution and deterrence.¹²² Deterrence, the notion that implementing punishment discourages crime,¹²³ is dependent upon its certainty and timeliness.¹²⁴ The execution delay inherent to California's death penalty system has blatantly made executions untimely and has additionally made executions uncertain. With no executions since 2006 and only thirteen total since

118. *Id.* at 1060–61.

119. *See id.* at 1062.

120. *Id.*

121. *See id.* at 1063 (“Arbitrariness in execution is still arbitrary, regardless of when in the process the arbitrariness arises.”).

122. *Id.*

123. STEPHEN STANKO ET AL., *LIVING IN PRISON: A HISTORY OF THE CORRECTIONAL SYSTEM WITH AN INSIDER'S VIEW* 56 (2004).

124. *Jones*, 31 F. Supp. 3d at 1064; *United States v. Panico*, 308 F.2d 125, 128 (2d Cir. 1962) (“There can be little doubt that the effectiveness of punishment as a deterrent is related not only to the quality of the possible punishment but to the certainty and promptness as well.”); STANKO, *supra* note 123, at 57 (“Deterrence is dependent upon the severity, speed, and swiftness of the punishment.”).

1978, more death row inmates in California have died from natural causes than from execution.¹²⁵ Thus, “[a]s the ultimate in-between punishment between life imprisonment and the death penalty,” a death row inmate cannot be certain when or if his sentence will ever be carried out.¹²⁶ Retribution rests on the theory that one deserves to be disciplined for committing an offense.¹²⁷ In the context of capital sentencing, retribution accordingly means that inmates are executed because they deserve it.¹²⁸ Even dating back to *Furman* in 1972, the Court recognized that an infrequent application of the death penalty would cease to serve any retributive purpose.¹²⁹ However, due to the excessive delays in California’s death penalty system, those who have committed the most heinous crimes for which a death sentence is imposed are for all practical purposes merely serving out life sentences.¹³⁰

3. Distinguishing *Jones* from Prior Unsuccessful *Lackey* Claims

As the court in *Jones* stated, courts often reject *Lackey* claims based on two justifications: “first, that the delay is reasonably related to the state’s effort to safeguard the inmate’s constitutional rights by ensuring the accuracy of its death conviction and sentence, and second, that the delay is caused by the petitioner himself, and therefore cannot be constitutionally problematic.”¹³¹ The court, however, found that these bases for denying *Lackey* claims were not applicable to California’s administration of the death penalty.¹³² Although the State in *Jones* did not argue that California’s delay is rational or necessary to ensure the accuracy of inmates’ convictions, the court nonetheless noted that these arguments would have been unreasonable.¹³³ As evidence, the court cited to the Commission’s proposed reforms to California’s death penalty system which would lower the total elapsed time between sentencing and execution from twenty-five years to the then national average of eleven to fourteen years.¹³⁴ The court moreover found that the state itself, not the

125. *Jones*, 31 F. Supp. 3d at 1062 (“For every one inmate executed by California, seven have died on Death Row, most from natural causes.”).

126. Angela April Sun, Note, “*Killing Time*” in the Valley of the Shadow of Death: Why Systematic Preexecution Delays on Death Row Are Cruel and Unusual, 113 COLUM. L. REV. 1585, 1620 (2013).

127. See STANKO ET AL., *supra* note 123, at 56.

128. *Furman v. Georgia*, 408 U.S. 238, 304 (1972) (Brennan, J., concurring).

129. See *id.* at 311 (White, J., concurring).

130. See *Jones*, 31 F. Supp. 3d at 1065.

131. *Id.*

132. See *id.* at 1065–66.

133. See *id.* at 1066.

134. *Id.* at 7–10, 25–26. Ninth Circuit Judge Arthur Alarcón has similarly stated that delays are not “inevitable” (as Justice Thomas suggested), so long as California takes action to correct

inmates, was responsible for the majority of delay in California's post-conviction review process;¹³⁵ there was no basis to determine that California's death row inmates "are simply more dilatory, or have stronger incentives to needlessly delay the capital appeals process" than other states' death row inmates.¹³⁶ Rejecting popular reasoning for denying *Lackey* claims, the court ultimately attributed the delay in Jones' case to the state's inherently dysfunctional death penalty system.¹³⁷

B. Nationwide Systematic Delay

Although the Central District of California is the first to recognize and declare systematic delay of the death penalty unconstitutional, other states do not seem far behind. Increasing pre-execution delays, state death penalty system assessments, and governor-imposed moratoriums suggest that systematic delay likely exists outside of California.

1. Pre-execution Delays Across America

Delay has not always plagued executions; in colonial and early American times, authorities typically carried out executions within a matter of days, weeks, or sometimes months if someone contested the case.¹³⁸ However, from 1930 to 1970, the average length of time between sentencing and execution in the United States rose to 36.7 months.¹³⁹ Following the death penalty's reinstatement in 1977, the Bureau began tracking capital punishment statistics, including the elapsed time from sentencing to execution.¹⁴⁰ Because executions were sparse in the immediate years following the reinstatement, there are no reliable averages of execution delays dating that far back.¹⁴¹ However, in 1984, the first time that there were enough executions to formulate a reliable number, the Bureau reported that the average elapsed time from sentencing to execution for all inmates totaled 6.2 years.¹⁴² This average had more than doubled by 2013, increasing to 15.5 years.¹⁴³ With inmates lingering on death row for such lengthy periods of time, more inmates

its dysfunctional system. Alarcón, *supra* note 110, at 711 (quoting *Knight v. Florida*, 528 U.S. 990, 992 (1999) (Thomas, J., concurring in denial of certiorari)).

135. *See id.* at 1067.

136. *Id.*

137. *Id.*

138. JOHN D. BESSLER, *CRUEL & UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT* 226 (2012).

139. EVAN J. MANDERY, *CAPITAL PUNISHMENT IN AMERICAN: A BALANCED EXAMINATION* 473 (2d. ed. 2012).

140. *See* SNELL, *supra* note 1, at 14 tbl.10.

141. *See id.*

142. *Id.*

143. *Id.*

have died of old age than of executions in states with high death row populations.¹⁴⁴

These execution delays common to present day America vary amongst states.¹⁴⁵ But while the Commission Report found California's elapsed time from sentencing to execution exceeded two decades as of 2008,¹⁴⁶ the Bureau Report does not reflect that California is an outlier for execution delay. As of year-end 2013, the Bureau Report reflects that the average time spent under a sentence of death in California is 16.1 years.¹⁴⁷ Comparatively, Tennessee, Kentucky, Nevada, and Idaho prisoners experience longer execution delays,¹⁴⁸ while Georgia, Ohio, North Carolina, and Florida prisoners experience delays of around fifteen years.¹⁴⁹ States like these, with execution delays exceeding or closely approaching that of California and the national average, are most vulnerable to a court finding the delays systematic and potentially unconstitutional in the wake of *Jones*.

2. State Death Penalty Assessments

The American Bar Association's (ABA) assessments of state death penalty systems also suggest that systematic delay is not isolated to California. To date, the ABA has conducted assessments and released reports on the death penalty's administration in twelve states: Alabama, Arizona, Florida, Georgia, Indiana, Kentucky, Missouri, Ohio, Pennsylvania, Tennessee, Texas, and Virginia.¹⁵⁰ The assessments compare each state with over ninety ABA benchmarks on the constitutional administration of the death penalty.¹⁵¹ Reports include detailed sections covering various aspects of states' death penalty systems similar to those that the Commission Report outlined in California.¹⁵²

144. Newton, *supra* note 4, at 989.

145. See SNELL, *supra* note 1, at 18 tbl.15.

146. COMMISSION REPORT, *supra* note 14, at 6. The Report additionally states that "[t]he average lapse of time between pronouncement of a judgment of death and execution in California is 17.2 years, but using an 'average' number may be misleading since only thirteen have been executed." *Id.* at 22.

147. SNELL, *supra* note 1, at 18 tbl.15.

148. *Id.* Inmates in these states respectively spend an average of 18.4 years, 18.3 years, 17.7 years, and 16.2 years on death row. *Id.*

149. *Id.* Inmates in these states respectively spend an average of 15.5 years, 15.4 years, 15.2 years, 15.1 years, and 15 years on death row. *Id.*

150. *State Death Penalty Assessments*, AM. BAR ASS'N, http://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/state_death_penalty_assessments.html (last visited Jan. 17, 2017).

151. *Id.*

152. *Id.*

With respect to legal defense, the state assessments found that most states do not have “the kind of legal services system that is necessary to ensure that defendants charged with capital offenses or on death row receive the defense they require.”¹⁵³ In fact, “[f]ew states meet the standards set out by the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003)” (ABA Guidelines).¹⁵⁴ The state assessments identified that most examined states “lack rigorous qualification standards for and monitoring of counsel appointed to capital cases.” Because the ABA Guidelines “embody the current consensus about what is required to provide effective defense representation in capital cases,”¹⁵⁵ it follows that these shortcomings likely result in less than effective representation, which the Commission Report found contributes systematic delay.¹⁵⁶ The state assessments also identified inadequate compensation of counsel in the majority of examined states much like in California.¹⁵⁷ Several state assessments even resulted in the ABA recommending moratoriums on executions until states adequately comply with the assessments’ recommendations.¹⁵⁸ The state assessments collectively demonstrate that other states are facing many of the same problems responsible for delay in California’s death penalty system. It is therefore possible that states such as these will soon recognize systematic delay in their own death penalty systems.

153. AM. BAR ASS’N, *THE STATE OF THE MODERN DEATH PENALTY IN AMERICA* 7 (2013), http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/aba_state_of_modern_death_penalty_web_file.authcheckdam.pdf.

154. *Id.* at 7.

155. AM. BAR ASS’N, *GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES* 920 (2003), http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf.

156. *See* COMMISSION REPORT, *supra* note 14, at 57–58.

157. *See State Death Penalty Assessments*, *supra* note 150.

158. *Id.* The ABA recommended moratoriums in Alabama, Georgia, Indiana, and Tennessee. AM. BAR ASS’N, *EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE ALABAMA DEATH PENALTY ASSESSMENT REPORT* iv (2006), <http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/alabama/report.authcheckdam.pdf>; AM. BAR ASS’N, *EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE GEORGIA DEATH PENALTY ASSESSMENT REPORT* v (2006), <http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/georgia/report.authcheckdam.pdf>; AM. BAR ASS’N, *EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE INDIANA DEATH PENALTY ASSESSMENT REPORT* viii (2007), <http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/indiana/report.authcheckdam.pdf>; AM. BAR ASS’N, *EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE TENNESSEE DEATH PENALTY ASSESSMENT REPORT* ix (2007), <http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/tennessee/finalreport.authcheckdam.pdf>.

3. Death Penalty Repeals and Moratoriums

Nineteen states and the District of Columbia to date have abolished the death penalty.¹⁵⁹ Meanwhile, Colorado, Oregon, Pennsylvania, and Washington are currently under governor-imposed moratoriums—all four states acknowledging delay of the death penalty system as a motivating factor.¹⁶⁰ Explaining his 2015 decision, Pennsylvania Governor Tom Wolf stated that the “the only certainty in the current system is that the process will be drawn out, expensive, and painful for all involved.”¹⁶¹ Washington Governor Jay Inslee similarly commented in support of his 2014 decision that Washington’s “death sentences are neither swift nor certain.”¹⁶² Likewise, then-Oregon Governor John Kitzhaber expressed concerns over pre-execution delay, stating in 2011, “The reality is that Oregon’s death row is an extremely expensive life prison term.”¹⁶³

A combination of state execution delays that continue to exceed those in California and the national average, a public push for state death penalty review, and gubernatorial moratoriums on executions are all good indications that the system is in a state of flux. Other states may accordingly soon recognize and declare systematic delays unconstitutional using reasoning similar to the court in *Jones*, which would likely require the Supreme Court to finally address pre-execution delay.

159. *States with and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Jan. 17, 2017).

Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin have abolished the death penalty. *Id.*

160. *See Statements from Governors of Pennsylvania, Washington, Colorado, and Oregon Halting Executions*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/5792> (last visited Jan. 17, 2017); *see also*, e.g., Colo. Exec. Order No. D 2013-006 (May 22, 2013), <http://www.deathpenaltyinfo.org/documents/COexecutiveorder.pdf> (“If the State of Colorado is going to undertake the responsibility of executing a human being, the system must operate flawlessly. Colorado’s system for capital punishment is not flawless.”).

161. Peter Hall, *Pennsylvania Gov. Tom Wolf Halts Death Penalty*, MORNING CALL (Feb. 13, 2015, 7:58 PM), <http://www.mcall.com/news/breaking/mc-pa-death-penalty-moratorium-tom-wolf-20150213-story.html> (quoting Pennsylvania Governor Tom Wolf).

162. Governor Jay Inslee, *Governor Inslee’s Remarks Announcing a Capital Punishment Moratorium* (Feb. 11, 2014), http://www.governor.wa.gov/sites/default/files/documents/20140211_death_penalty_moratorium.pdf.

163. Press Release, Oregon Governor’s Office, Gov. Kitzhaber Issues Reprieve—Calls for Action on Capital Punishment (Nov. 22, 2011), <http://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=589>.

III. LEGISLATION MINIMIZING SYSTEMATIC DELAY

Some states have or are in the process of enacting legislation in efforts to reduce delays in the postconviction review process. This Part examines whether such legislation may provide a solution to the systematic delay recently recognized in California—delay that other states and the Supreme Court may soon identify.

A. Florida's "Timely Justice Act"

In June 2013, Florida passed the "Timely Justice Act" with the legislative intent to resolve all postconviction actions as quickly as possible.¹⁶⁴ To accomplish this objective, the Act addresses areas including legal representation, reporting requirements, and—most controversially—death warrants.¹⁶⁵ As the first legislation of its kind,¹⁶⁶ the Timely Justice Act has sparked great debate. While its supporters contend it will minimize pre-execution delay, opponents argue that it will "exacerbate existing problems in a system already plagued by errors and a lack of funding and resources."¹⁶⁷

1. Key Provisions of the Timely Justice Act

With respect to legal representation, the Act seeks to protect inmates by prohibiting attorneys from representing a capital defendant for five years if, on two separate occasions, an attorney provided "constitutionally deficient representation" in capital postconviction proceedings for which relief was granted.¹⁶⁸ This encourages competent lawyering that could reduce delays caused by ineffective assistance of counsel—delay which contributes to California's systematic delay. Still, the potential reduction in the number of available attorneys could simultaneously create delay of its own. Moreover, even assuming available qualified attorneys remain, the Act requires the court to grant relief for deficient representation in order for attorney suspension to take effect, and surely a large amount of deficient representation is not granted relief, goes unnoticed, or perhaps is not realized until years later.

The Act additionally reopens a Capital Collateral Regional Counsel (CCRC) office in the northern part of Florida.¹⁶⁹ CCRC exclusively

164. See S.B. 1750, 2013 Leg., Reg. Sess. (Fla.) (legislative history of Timely Justice Act of 2013, 2013 Fla. Laws 2596).

165. *Id.*

166. Bagdasarova, *supra* note 24.

167. *Id.*

168. State of Fla. Appropriations Committee, Bill Analysis and Fiscal Impact Statement, S.B. 1750, at 2 (Apr. 22, 2013), <https://www.flsenate.gov/Session/Bill/2013/1750/Analyses/2013s1750.ap.PDF>.

169. *Id.*

handles postconviction review and receives compensation from the state.¹⁷⁰ Florida's northern CCRC office was terminated in 2003, in favor of a pilot program of private appointed attorneys meeting minimum capital experience requirements.¹⁷¹ Unfortunately, the pilot program was widely criticized for providing poor lawyering.¹⁷² Reopening the northern CCRC office will accordingly provide capital defendants with more effective counsel, which will in turn reduce delays in postconviction review. This provision of the Act better addresses delay caused by ineffective assistance of counsel than does placing attorneys who have provided deficient representation on probation because it prevents the delay at its root cause. The availability of effective state counsel would additionally help to solve delays in appointment of counsel—another area of California's systematic delay.

The Act fails, however, to provide a remedy for the many death row inmates that may have received ineffective assistance of counsel during the pilot program's existence.¹⁷³ The ABA contends that "many of the prisoners whose appeals were exhausted under the pilot program may now be subject to expedited execution procedures without appointment of new counsel."¹⁷⁴ As for prisoners who have not yet exhausted their appeals, the Act permits attorneys previously appointed through the pilot program to continue representing death row inmates in their appeals.¹⁷⁵ The Act also increases the amount of capital defendants that those attorneys may represent at one time from five to ten.¹⁷⁶ This could cause delays at the federal habeas stage if attorneys from the pilot program provided or continue to provide poor lawyering resulting in the failure to exhaust available state remedies. Considering that these attorneys may now double their caseloads of capital defendants, the risk of delay for failure to exhaust might become even greater. Although the faults of the pilot program are specific to Florida, they reinforce the importance of competent habeas counsel in reducing systematic delay as recognized in California.

In addition to addressing legal representation, the Act aims to remedy delay through the imposition of reporting requirements on courts. For

170. See Gary Blankenship, *Capital Cases Pilot Program Reviewed*, FLA. BAR NEWS (Oct. 15, 2003), <http://www.floridabar.org/DIVCOM/JN/JNnews01.nsf/Articles/A9527C3261C90D2085256DBB007378D9>.

171. Bagdasarova, *supra* note 24.

172. *Id.* ("Florida Supreme Court Justice Raoul Cantero . . . described the work of the appointed lawyers as '[s]ome of the worst lawyering' he had ever seen.").

173. *Id.*

174. *Id.*

175. *See id.*

176. S.B. 1750, 2013 Leg., Reg. Sess. (Fla) (legislative history of Timely Justice Act of 2013, 2013 Fla. Laws 2596).

instance, the Act requires the “Florida Supreme Court [to] annually report to the [Legislature] the status of each capital case in which a postconviction action has been filed that has been continuously pending for more than [three] years.”¹⁷⁷ While this provision enables the state to monitor delays, a more effective provision would set out a plan for remedying them.

Most controversially, the Timely Justice Act seeks to expedite the death penalty process by requiring the governor to sign an execution warrant within thirty days of the clemency process’ conclusion and to schedule an execution within 180 days thereafter.¹⁷⁸ Although the Act’s execution warrant timeline does protect against delay, neither California nor previous *Lackey* claims have recognized delay after the conclusion of clemency. The court in *Jones* nonetheless considered the total elapsed time between sentencing and execution in defining systematic delay, suggesting that systematic delay includes delay after the conclusion of postconviction review.¹⁷⁹ Even so, this provision of the Act would only minimally contribute to resolving California’s systematic delay because its biggest delays occur during the automatic appeal, the state habeas petition, and the federal habeas petition.¹⁸⁰

2. Responses to the Act and its Ability to Alleviate Systematic Delay

Although the Timely Justice Act offers meaningful insight as to how systematic delay might be reduced, it has not been widely championed, particularly in light of the ABA’s state assessment of Florida’s death penalty system. The ABA in 2006 found that multiple areas of Florida’s death penalty system “fall[] short in the effort to afford every capital defendant fair and accurate procedures” including insufficient compensation for postconviction review counsel and lack of qualified and properly monitored postconviction review counsel.¹⁸¹ These systematic problems, the ABA reported, contribute to Florida having the highest exoneration rate in the country.¹⁸²

177. *Id.*

178. FLA. STAT. § 922.052(2)(a) (2015).

179. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1056–59 (C.D. Cal. 2014), *rev’d sub nom.*, *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

180. *Id.*

181. AM. BAR ASS’N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE FLORIDA DEATH PENALTY ASSESSMENT REPORT iii (2006), <http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/florida/report.authcheckdam.pdf>.

182. Bagdasarova, *supra* note 24.

Upon proposal of the Timely Justice Act, the ABA therefore expressed concern that by accelerating postconviction review, the opportunity for wrongful conviction would be increased.¹⁸³ President Laurel Bellows of the ABA even wrote to Florida's Governor Rick Scott urging him to veto the Act.¹⁸⁴ She wrote, "Florida's existing system cannot ensure fairness or accuracy, which must be the hallmarks of any case in which the death penalty is sought. The legislation before you does little to correct or prevent miscarriages of justice in cases where a person's life is at stake"¹⁸⁵

Death row inmates have similarly questioned the Act's efforts to speed up postconviction review. Less than a month after Florida passed the Act, over 100 death row inmates filed a challenge to the Florida Supreme Court, arguing that "[c]onstitutional protections must not be lost to expediency."¹⁸⁶ Petitioners alleged, amongst other claims, that the Act's time requirements for issuing death warrants prevent inmates from pursuing other capital proceedings, such as successive postconviction litigation, and infringe upon the court's authority to regulate practice and procedure.¹⁸⁷ The Florida Supreme Court, however, upheld the Act as constitutional.¹⁸⁸

In considering the impact that Florida's Timely Justice Act could have on California's death penalty system, it must be noted that, unlike California, studies of Florida's death penalty system have not yet focused on its delays or their causes. Nonetheless, while the Commission Report found that capital defendants in California who are denied relief at every level of postconviction review spend between twenty and twenty-five years on death row, the Bureau's reports track California and Florida's pre-execution delays on a much closer scale. According to the Bureau's most recent report, California inmates spend an average of 16.1 years between sentencing and execution while Florida inmates experience average pre-execution delays of 15.0 years.¹⁸⁹ That Florida is experiencing delays on a similar scale to California and has passed an Act seeking to reduce delays therefore suggests that Florida too may be experiencing systematic delay. Accordingly, although the Timely Justice Act was not written with an eye to California's systematic delay, it offers insight as to how systematic delay might best be addressed.

183. *See id.*

184. Letter from Laurel G. Bellows, President, Am. Bar Ass'n, to Rick Scott, Fla. Governor (May 15, 2013), http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013may16_timelyjustice_1.authcheckdam.pdf.

185. *Id.*

186. Bagdasarova, *supra* note 24.

187. *E.g.*, *Abdool v. Bondi*, 141 So. 3d 529, 538 (Fla. 2014).

188. *Id.* at 540.

189. SNELL, *supra* note 1, at 18 tbl.15.

Even though the Act has received criticism for speeding up postconviction review, it is significant that the Act addresses problems that the ABA's state assessment of Florida's death penalty system identified. The Act makes efforts to ensure qualified and properly monitored postconviction review counsel in light of Florida's leading exoneration rate. These provisions would be beneficial to California as well as other states in reducing, or at the very least, preventing delays in postconviction review. However, the Act fails to offer a solution to the ABA's finding that postconviction review counsel in Florida are insufficiently compensated. This is troublesome considering that California found inadequate compensation of counsel contributes to various delays throughout postconviction review.¹⁹⁰ In California, inadequate compensation of counsel initially creates delays in appointment of counsel at the automatic appeal and state habeas review, which in turn causes delays in the filing of briefs and the issuance of decisions.¹⁹¹ California also found that insufficient compensation in hand with underfunding of counsel contribute to delays at the federal level of review when claims are stayed for failure to exhaust available state remedies.¹⁹² These delays in California suggest that it was an oversight for the Timely Justice Act to ignore the ABA's finding that Florida insufficiently compensates postconviction review counsel. Similar to the universal applicability of the Act's provisions regarding competent counsel, adequate compensation and funding of counsel would help to alleviate postconviction delays in California and at least contribute to preventing, if not reducing, delays nationwide.

Altogether, the Act's efforts to provide competent postconviction counsel have the potential to reduce systematic delay. Still, the Act fails to address Florida's inadequate compensation of counsel—California's seemingly biggest source of delay. Although remedying this problem would likely reduce delays further down the chain of postconviction review, the Act could additionally propose timelines for the appointment of counsel, filing of briefs, and issuance of decisions.

B. *California's Death Penalty Reform and Savings Act of 2016*

In the November 8, 2016 election, California voters passed the Death Penalty Reform and Savings Act of 2016, presented on the California ballot as Proposition 66. The Proposition seeks to eradicate wastes, delays, and inefficiencies in California's death penalty system through amendments and additions to California's Penal and

190. See Alarcón, *supra* note 110, at 717–21.

191. *Id.*

192. *Id.*

Government Codes.¹⁹³ Although the Proposition contains provisions sure to reduce delays, it also presents new issues. Proponents filed a suit on November 9, 2016 to block the Proposition from taking effect.¹⁹⁴

1. State Habeas Corpus Petitions

The Proposition first proposes to shorten delays at the state habeas level by granting initial jurisdiction over state habeas corpus proceedings to the trial courts. Petitioners will be required to file their original petitions for writ of habeas corpus in the trial court where the judgment of death was entered, unless good cause exists for the petition to be heard in another court.¹⁹⁵ In ruling on a petition, the trial court must “issue a statement of decision explaining the factual and legal basis for its decision[.]”¹⁹⁶ Within thirty days, petitioners may then appeal the trial court’s findings to the district courts of appeal, who will be “required to file an opinion on the rulings of the trial court before the Supreme Court reviews the case.”¹⁹⁷ If the California Supreme Court disagrees with the appellate court, it may reverse the appellate court’s decision and “send the matter back for modification or for return to the trial court for further hearings on any or all of the habeas corpus claims raised in the petition.”¹⁹⁸ Altogether, the Proposition’s requirement that petitioners file their initial habeas corpus petitions in the trial courts adds two additional layers of review to California’s death penalty system.¹⁹⁹

This shift in initial habeas corpus jurisdiction is unquestionably an effort to alleviate the California Supreme Court’s backlog. Yet opponents point out that California counties do not proportionately issue death sentences.²⁰⁰ In the past ten years, California has sentenced 188 people to death, 136 of which were sentenced in just five counties.²⁰¹ Opponents of the Proposition accordingly fear that it will create unmanageable workloads for trial and appellate courts, in addition to creating

193. Death Penalty Reform and Savings Act of 2016, Cal. Prop. 66, https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0096%20%28Death%20Penalty%29_0.pdf.

194. *Former California Officials File Taxpayer’s Suit Against Proposition 66*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/6602> (last visited Jan. 17, 2017).

195. Death Penalty Reform and Savings Act § 6.

196. *Id.*

197. Alarcón Advocacy Center, *California Votes 2016: An Analysis of the Competing Death Penalty Ballot Initiatives* 55 (July 20, 2016), <http://www.lls.edu/media/loyolalawschool/newsroom/newsitems/FINAL%20Alarcon%20Advocacy%20Center%20Report%20Competing%20DP%20Initiatives.pdf>.

198. *Id.*

199. *Id.*

200. *Bureaucratic Nightmare*, NO ON 66, <https://nooncaprop66.org/bureaucratic-nightmare/> (last visited Jan. 17, 2017).

201. *Id.*

complications for the California Supreme Court in reviewing decisions of lower court judges who do not have experience handling capital habeas petitions.²⁰² These fears, however, seem unwarranted. Although state habeas petitions would initially burden trial and appellate courts disproportionately in light of the backlog of habeas corpus petitioners awaiting review, this effect would lessen as the backlog is reduced. The Proposition additionally caveats that a petition for writ of habeas corpus should be heard by the trial court which imposed the sentence, unless good cause is shown for the petition to be heard by another court. If good cause is interpreted to include the consideration of judicial resources, caseloads will remain manageable. Moreover, “[t]rial court judges are uniquely qualified to hear original habeas corpus claims because they are already familiar with the evidence presented at trial.”²⁰³

The Proposition’s requirement that trial and appellate court judges hearing the petition issue written orders explaining their decisions will also help in relieving delays. As the law in California stands, the California Supreme Court is not required to issue an order detailing its decision, which “places the burden on federal district courts to determine whether the death row inmate’s federal constitutional claims have merit.”²⁰⁴ Still, the Proposition could go further in reducing delays by “permit[ting] the [California] Supreme Court to exercise its discretion whether to review the opinion of a California Court of Appeal in affirming or denying a [trial] court’s judgment in a state habeas corpus proceeding.”²⁰⁵ This would eliminate an unnecessary step in the review process when the California Supreme Court has no reason to believe that a capital petitioner’s claims have merit.

2. Appointment of Counsel

In addition to the Proposition’s proposed legal structure for reviewing state habeas corpus petitions, it newly requires trial courts to take on the responsibility of appointing counsel to prisoners after a death sentence is imposed.²⁰⁶ Trial courts, inherently aware of when a death sentence has been imposed, are arguably in the best position to reduce the over eight year delay that exists between sentencing and the California Supreme Court’s appointment of habeas counsel.²⁰⁷ However, this provision of the Proposition ignores the Commission Report’s finding that delays in appointment of counsel are largely due to the underfunding and

202. *Id.*

203. Alarcón, *supra* note 110, at 743.

204. *Id.* at 744.

205. *Id.*

206. Death Penalty Reform and Savings Act of 2016 § 6, Cal. Prop. 66, https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0096%20%28Death%20Penalty%29_0.pdf.

207. COMMISSION REPORT, *supra* note 14, at 24.

inadequate compensation of counsel.²⁰⁸

The Proposition's provisions regarding appointment of counsel at the direct appeal are even more concerning. The Proposition provides that

[w]hen necessary to remove a substantial backlog in appointment of counsel for capital cases, the [California] Supreme Court shall require attorneys who are qualified for appointment to the most serious non-capital appeals and who meet the qualifications for capital appeals to accept appointment in capital cases as a condition for remaining on the court's appointment list.²⁰⁹

This aims to reduce the current delays of three to five years in the appointment of counsel to handle the direct appeal. But much like delays in appointment of state habeas counsel, delays in the appointment of counsel to handle the direct appeal are attributable to inadequate compensation.²¹⁰

Although placing the burden on trial courts to appoint state habeas counsel is a helpful, albeit small, step in reducing delays, requiring appellate attorneys to accept appointments to remain on the appointment list may “open a floodgate of new ineffective assistance of counsel cases due to an increased number of incompetent, unqualified, [and] improperly trained lawyers taking death penalty cases.”²¹¹ It is also questionable whether forced appointments would even aid in reducing delays considering that a survey of appellate attorneys found that 73% would rather retire or leave the appointment list than be forced to take on capital cases.²¹² Moreover, requiring trial courts to appoint state habeas counsel and permitting the California Supreme Court to require appellate counsel to accept appointments both overlook the role that inadequate compensation plays in the availability of attorneys willing to accept appointment.

208. See COMMISSION REPORT, *supra* note 14, at 52–54; Alarcón Advocacy Center, *supra* note 197, at 56 (The Proposition “allocates no additional funding to these courts to carry out this enormous task, nor does it indicate where or how the superior courts are supposed to locate qualified habeas counsel to take on these cases, which is concerning given that the California Supreme Court, and other state entities dedicated to carrying out that task, have been unsuccessful in finding qualified, available counsel.”).

209. Death Penalty Reform and Savings Act § 5.

210. Commission Report, *supra* note 14, at 47 (“For the level of experience required and the rigorous demand of death appeals, the low level of income is certainly a significant factor in the decline of the pool of attorneys available to handle death penalty appeals.”).

211. *Proposition 66, The “Death Penalty Reform and Savings Act of 2016,” is Fool’s Gold for Californians*, THE MODERATE VOICE, <http://themoderatevoice.com/217736/> (last visited Jan. 17, 2017).

212. Alarcón Advocacy Center, *supra* note 197, at 52–56.

Addressing inadequate compensation would more effectively reduce delays in appointment of counsel as well as the myriad of delays resulting therefrom. The Commission Report proposed that “[t]he most direct and efficient way to reduce the backlog of death row inmates awaiting appointment of appellate counsel would be to . . . expand the Office of the State Public Defender.”²¹³ “[T]o the extent appointments of private counsel are utilized,” the Commission Report recommended that they “be fully compensated at rates that are commensurate with the provision of high quality legal representation and reflect the extraordinary responsibilities in death penalty representation.”²¹⁴ To address delays in appointment of state habeas counsel, the Commission Report similarly suggested that California expand its habeas corpus resource center and ensure that appointed counsel are sufficiently compensated.²¹⁵

3. The Filing and Deciding of State Habeas Petitions

With respect to timeframes, the Proposition requires that state habeas counsel file the initial habeas petition within one year of appointment, unless limited exceptions apply.²¹⁶ Attorneys were previously given three years from the date of their appointment to file the habeas petition.²¹⁷ Although limiting the filing time to one year will reduce delays, it may force attorneys to spend less of their already limited time and resources in preparing the initial petition. Because the failure to fully investigate a petitioner’s claims at the state habeas level significantly influences delays at the federal habeas level, the one-year filing timeline may very well contribute to delays instead of remedying them. Providing adequate compensation and funding to state habeas counsel would be a more effective way for the Proposition to reduce delays in the filing of state habeas claims. Adequate compensation would lead to the availability of more state habeas counsel which would in turn reduce delays in filing because counsel would have more time to dedicate to each petition. Increasing funding to counsel would at the same time assure that claims are fully investigated at the state habeas level, thus reducing delays in federal habeas review.²¹⁸

Once the initial habeas petition is filed, the Proposition requires that the trial court resolve it within one year, unless “delay is necessary to

213. COMMISSION REPORT, *supra* note 14, at 47.

214. *Id.* at 49.

215. *Id.* at 55.

216. Death Penalty Reform and Savings Act of 2016 § 6, Cal. Prop. 66, https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0096%20%28Death%20Penalty%29_0.pdf; *see* CAL. GOV’T CODE § 68662 (West 2016).

217. COMMISSION REPORT, *supra* note 14, at 51.

218. *Id.* at 53.

resolve a substantial claim of actual innocence, but in no instance shall the court take longer than two years to resolve the petition.”²¹⁹ Because the current delay between the filing of a state habeas petition and the California Supreme Court ruling on it is only 22 months, this provision would at best only minimally reduce delay. Opponents of the Proposition argue that assuming habeas corpus petitions are distributed in accordance with the counties issuing death sentences, capital caseloads may demand over 100% of a trial court’s judicial resources, displacing, rather than remedying delay.²²⁰ However, the burden on judicial resources would lessen as the backlog of habeas petitions is reduced, or could be avoided altogether if “good cause” is interpreted to consider judicial resources.

The Proposition further requires that the Judicial Counsel “adopt initial rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review” so that state courts may complete the automatic appeal and initial state habeas review “[w]ithin five years of the adoption of the initial rules or the entry of judgment, whichever is later.”²²¹ This would be a drastic reduction from the average delay of twelve years that the Commission Report found to exist between the imposition of a death sentence and the issuance of the California Supreme Court’s decision on the habeas petition.²²² The Alarcón Advocacy Center has opined, however, that

[d]eciding all capital appeals and state post-conviction petitions within five years is not only not feasible or advisable—it is *not possible*. The California Supreme Court is *required* under the California Constitution to hear all direct appeals in capital cases, but it cannot keep up with the pace of new death sentences. The Court currently has a backlog of over 150 fully briefed capital appeals and habeas petitions that are awaiting oral argument and final disposition. Hundreds more are in the pipeline, many where counsel has yet to be appointed, and a steady stream of new cases behind those with no end in sight.²²³

One proposed solution to the California Supreme Court’s backlog that could allow for initial state habeas petitions to be decided more quickly is giving California Courts of Appeal jurisdiction to review automatic appeals from death penalty judgments.²²⁴ Under this proposal, the

219. Death Penalty Reform and Savings Act § 6.

220. Alarcón Advocacy Center, *supra* note 197, at 57 “[I]n Riverside County, the capital habeas caseload would demand 107% of the county’s current superior court judicial resources.”).

221. Death Penalty Reform and Savings Act § 3.

222. COMMISSION REPORT, *supra* note 14, at 25.

223. Alarcón Advocacy Center, *supra* note 197, at 58.

224. Alarcón, *supra* note 110, at 727.

California Supreme Court should be given the discretion to grant or deny a motion for review of a Court of Appeal's decision in an automatic appeal.²²⁵ This revised review of automatic appeals would result in a vast reduction of the back log of cases currently awaiting the California Supreme Court's review.

4. Responses to California's Death Penalty Reform and Savings Act of 2016

The day after the Proposition was passed, opponents filed a suit to enjoin it from taking effect, arguing that its deadlines would set "an inordinately short timeline for the courts to review those complex cases and result in attorneys cutting corners in their investigations."²²⁶ Though its constitutionality thus remains unclear, the Proposition's proposed review cycle for state habeas claims could prove instrumental in reducing California's delays. The Proposition's provisions regarding appointment of counsel and the filing and deciding of state habeas petitions, however, fail to address that the underlying cause of California's delays in appointment of counsel is inadequate compensation. The Proposition also fails to provide meaningful reductions in delays at the automatic appeal, rendering the Proposition incapable of drastically reducing the California Supreme Court's backlog.

IV. PROPOSING A SOLUTION TO SYSTEMATIC DELAY

Pre-execution delay is problematic for inmates on death row—even if not yet declared unconstitutional—and a solution is necessary to uphold the purposes of the death penalty. Therefore, this Note proposes recommendations for legislation to reduce and prevent pre-execution delay occurring at the automatic appeal and state habeas level of review and analyzes why the recommendations are more effective and comprehensive than existing legislation.

Every state should establish comprehensive legislation to reduce and prevent pre-execution delay occurring at the direct appeal and state habeas level of review. In doing so, the importance of states conducting in depth assessments of their own death penalty systems cannot be understated; states must ensure that their legislation addresses any delays and problems unique to their death penalty systems. Nonetheless, at a minimum, state legislation should define systematic delay using the same definition as the court in *Jones*. This definition encompasses delay

225. *Id.*

226. Brian Melley, *Death Penalty Foes Ask Court to Pre-emptively Block Proposition 66 Streamlining Measure*, ORANGE COUNTY REG. (Nov. 11, 2016) <http://www.ocregister.com/articles/death-735164-appeals-penalty.html>.

occurring “at each stage of the post-conviction review process, including from the time the death sentence is issued.”²²⁷ Using that definition, state legislation should set out sections addressing delay both at the direct appeal and state habeas review. Addressing delay within state control will resultantly reduce delay in federal habeas review because delay at the direct appeal and state habeas review has a spill over effect. State legislation should also refrain from creating time-certain deadlines for postconviction review proceedings because at least some delay is necessary to ensure that constitutional protections are upheld. Instead, legislation should set timelines for appointment of counsel, filing of briefs, and issuance of decisions, but allow courts discretion to grant time extensions in exceptional circumstances.

A. *Recommendations for Direct Appeals*

The state legislation should first provide state courts of appeal jurisdiction to review direct appeals from death penalty sentences.²²⁸ The courts of appeal should review orders of trial courts within their district and should issue opinions in each death penalty case.²²⁹ State supreme courts should then have discretion to grant or deny a motion for review of a court of appeal’s decision on a direct appeal of a death sentence.²³⁰ Providing state courts of appeal jurisdiction over direct appeals would reduce California’s backlog of cases awaiting direct appeal to the California Supreme Court and would reduce or prevent similar delays in other states. Present federal law supports this proposal:

A federal death row inmate convicted in federal court of a capital offense does not have the right to a direct appeal to the United States Supreme Court. The Supreme Court has jurisdiction over cases reviewed by a United States Court of Appeals ‘[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.’ Thus, a writ of certiorari is ‘not a matter of right, but of judicial discretion.’²³¹

State legislation must also provide adequate compensation to counsel willing to represent capital defendants on direct appeal. As California’s death penalty systems shows, inadequate compensation of counsel can significantly contribute to delays in appointment of appellate counsel. Ensuring that counsel for capital defendants are adequately compensated

227. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1056 (C.D. Cal. 2014), *rev’d sub nom.*, *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

228. Alarcón, *supra* note 110, at 727.

229. *Id.*

230. *Id.*

231. *Id.* at 727–28.

would accordingly help to reduce and prevent delay. In addition to raising the hourly rate for appellate counsel, state legislation should impose reasonable timelines for the appointment of counsel, filing of claims, and issuance of decisions on review of direct appeals, allowing courts the discretion to grant time extensions.

B. *Recommendations for Direct Habeas Review*

Like California's Proposition, legislation should reorganize the state habeas review cycle. State habeas petitions should be filed in the trial court where the judgment of death was entered. Legislation should also provide the right to appeal the denial of a state habeas petition to the state courts of appeal. Both the trial and appellate court judges should be required to issue written orders explaining their decisions. Going further than California's Proposition, the highest state court should be permitted to exercise its discretion whether to review a state court of appeal's opinion affirming or denying a trial court's judgment on a state habeas petition.

Much like the recommendations for direct appeal, state legislation must also provide adequate compensation to counsel willing to represent capital defendants at the state habeas level. State legislation should further impose timelines similar to California's Proposition for the appointment of counsel, filing of claims, and issuance of decisions on state habeas petitions, while permitting courts to grant time extensions. Unlike California, whose Proposition fails to address California's inadequate compensation of counsel, if counsel is adequately compensated, implementing time constraints on the filing of petitions should alleviate, rather than contribute to delay.

Although not contemplated under Florida's Act nor California's Proposition, state legislatures should additionally explore the possibility of establishing a jointly funded state and federal capital habeas agency. Continuity of counsel from the state to the federal habeas level would ensure that claims are adequately investigated and would reduce delay attributable to the failure to exhaust available state remedies.²³²

C. *Recommendations for Monitoring Delays and Counsel*

Beyond changes to the direct appeal and state habeas review, legislation should put in place a system to monitor capital cases and their counsel as the cases proceed through the postconviction review process. Similar to Florida's Act, legislation should require courts to report the status of any capital case that has had an appeal or petition pending for

232. *Id.*

more than three years. States should use this information to further assess and refine their legislation to ensure that it has the effect of reducing postconviction delay. State legislation should also adopt a provision similar to the provision in Florida's Act prohibiting attorneys from representing a capital defendant for five years if, on two separate occasions, an attorney provided constitutionally deficient representation in capital postconviction proceedings for which relief was granted. Unlike Florida, whose Act fails to address the ABA's finding that counsel is under-compensated, if counsel is adequately compensated, a provision like this should not result in a significant reduction of counsel able to represent capital defendants. Lastly, state legislation should, like Florida's Act, regulate the issuance of a warrant to execute the death sentence for any convicted capital defendant whose sentence is final because this will ensure that warrants for executions are carried out in a timely manner.

CONCLUSION

If states are going to continue implementing the death penalty, systematic delay must be addressed in order to ensure its constitutionality. This Note offers a solution to the systematic delay recently identified in California—delay that other states may also be experiencing. The most challenging aspect of enacting legislation to resolve systematic delay will undoubtedly be ensuring that constitutional protections are not lost to expediency. On one hand, delays in postconviction review may render the death penalty arbitrary. However, on the other, expedited postconviction review may present violations of due process, equal protection, and the Eighth Amendment's ban of cruel and unusual punishment. It will be critical for legislation to strike a balance that provides timely capital postconviction review while also protecting these constitutional interests, particularly considering that we live in a nation that often fails to get sentences right as the system stands today.²³³

233. See ELIZABETH A. MURRAY, OVERTURNING WRONGFUL CONVICTIONS: SCIENCE SERVING JUSTICE 92–93 (2015) (noting that according to the National Registry of Exonerations, in 2013 there were a total of eighty-seven exonerations in the United States).

